United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1437

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To be argued by
CLARK J. GURNEY

United States Court of Appeals
For the Second Circuit

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,
Plaintiffs-Appellees,

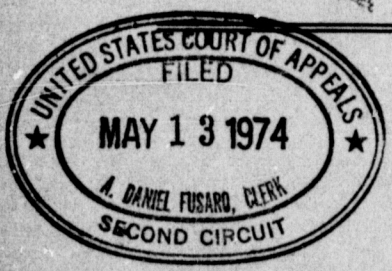
against

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,
Defendants-Appellants.

On Appeal from a Judgment and Order of the United States District Court for the Southern District of New York

(72 Civ. 1901)

BRIEF FOR DEFENDANTS-APPELLANTS



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Issues on Appeal

1(a). Were the defendants deprived of their property without due process of law under the rationale of *Rogers** in having their answers stricken and a default judgment in the sum of $919,147.50 entered as a "sanction" under

* *Societe Internationale, etc.* v. *Rogers,* 357 U.S. 197 (1958).

Fed. R. Civ. Pro. 37, when such sanction bore no reasonable relationship to defendants' alleged failure to comply with discovery obligations and was essentially punitive in nature?

(b). Is the justification for the imposition of the sanction of striking a party's pleading under Fed. R. Civ. Pro. 37 the presumption that the failure to supply information is an admission that such information would support the opposing party's claims? If so, does such presumption deprive defendants of their property without due process of law, where, as here, there was no showing or finding that the information sought by plaintiffs related in any material way to the merits of plaintiffs' claims?

2. Were the defendants deprived of their property without due process of law in having their answers stricken and a default judgment in the sum of $919,147.50 entered as a sanction under Fed. R. Civ. Pro. 37, where the record is uncontradicted that there was no knowing disobedience of any outstanding court order and defendants swore that they were willing to proceed with discovery forthwith?

3. Did the District Court err in applying a "good-faith" standard as the rationale for imposing the severest of all sanctions under Rule 37 for defendants' alleged failure to comply with discovery obligations?

4. Must a defendant's alleged failure to comply with discovery obligations be "wilful" before its answer can be stricken and a substantial default judgment entered under Rule 37? If so, did the District Court err in not making such finding of "wilfulness"?

5. Does Fed. R. Civ. Pro. 37 require that sanctions imposed thereunder for failure to supply information bear a reasonable relationship to the nature, quality and materiality of the information sought to be elicited as related to the issues in the action? If so, did the District Court err in not addressing itself to this issue in striking defendants' answers?

6. Did the District Court err in applying a "good-faith" standard in denying defendants' motion under Fed. R. Civ. Pro. 60(b) for an order vacating its order striking their answers as a sanction under Fed. R. Civ. Pro. 37?

7. Did the District Court err in denying defendants' motion under Fed. R. Civ. Pro. 60(b) where the moving affidavits made a *prima facie* showing on the issues of mistake and excusable neglect as to their alleged failure to comply with discovery obligations, where meritorious defenses to the action were set forth and a large default judgment was at stake?

8. Was the District Court required, constitutionally and as a matter of procedure, to hold an evidentiary hearing on defendants' motion under Fed. R. Civ. Pro. 60(b) as to the issues of fact presented in the affidavits concerning defendants' good faith and knowledge in connection with their alleged failure to comply with discovery obligations?

An affirmative answer to any of the foregoing questions requires a vacation of the Judgment and a reversal of the Order denying defendants' motion under Fed. R. Civ. Pro. 60(b).

Statement of the Case

Introduction

In this action brought under the Federal securities laws for alleged misrepresentations in connection with the sale of securities, defendants-appellants Flora Mir Candy Corporation and David I. Koegel* appeal from a default judgment in the amount of $919,147.50 entered on an order (Lasker, J.) pursuant to a motion under Fed. R. Civ. Pro. 37 (and from an order under Fed. R. Civ. Pro. 60(b) denying the vacation of that order) striking defendants' answer "for failure to respond" fully to subparts of four interrogatories (154a). The motion to strike was granted without a hearing, in the absence of opposing papers, and at a time when defendants were without counsel (18a).

The unanswered interrogatories are part of a forty-seven-page set of interrogatories, containing one hundred thirty separately numbered questions propounded to each defendant, which questions include subquestions, and subquestions to the subquestions, in total amounting to almost one thousand questions (22a-69a). To these interrogatories four separate sets of answers were provided, which themselves total hundreds of pages.** Plaintiffs also employed other discovery devices, including numerous depositions (R. 6, 9, 10, 11, 40; 171a).

If the desired result was to "discover" defendants into submission, it succeeded. A dispute arose between defend-

* Hereinafter referred to, as the context indicates, as "defendants," "Koegel" or "Flora Mir."

** "Answers to Interrogatories" (R 16); "Supplemental and Amended Answers to Interrogatories" (R 18); "Supplemental Answers to Plaintiffs' Interrogatories" (R 19); and "Supplemental Answers No. 2 to the Plaintiffs' Interrogatories" (R 20).

ants and their counsel over their respective responsibilities concerning plaintiffs' endless discovery demands and the extraordinary legal fees occasioned thereby (compare 95a and 146a), prompting defendants' attorneys to write to plaintiffs' counsel unilaterally informing them that they were "no longer counsel to defendants" (182a).

Then, whether by incredible coincidence or otherwise, on the same day that defendants' counsel filed a motion for an order relieving it as counsel, plaintiffs moved for the order striking defendants' answer (154a). Although the motion to strike was directed to events and proceedings in the action which occurred entirely under, and directly involved, the stewardship of defendants' then counsel, the Court granted the motion to be relieved (21a). As noted above, it then granted by default the motion to strike, while defendants were actively attempting to obtain successor counsel (18a).*

Defendants finally obtained successor counsel and moved for an order under Fed. R. Civ. Pro. 60(b), vacating the order which struck their answer. By Memorandum and Order, dated January 25, 1974, that motion was denied,

> "since we [the District Court] are not persuaded by the papers submitted by defendants on this motion that their repeated failures to cooperate in plaintiffs' requests for discovery demonstrated the good faith effort contemplated by the Federal Rules." (15a).

Thus, reduced to essentials, plaintiffs, without once reaching the merits of their case, obtained a huge judgment,

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* It cannot be seriously thought that in the absence of counsel, defendant Koegel could respond to the motion. Although not in the record before the Court, in the interests of justice, the Court should know that Mr. Koegel is an immigrant who spent his younger years in numerous concentration camps.

which included over $400,000 in punitive damages, not dischargeable in bankruptcy, which, if permitted to stand, will deprive the individual defendant* and his family of the fruits of a life's work.

Nature of the Action and Proceedings to Date

Briefly, this is an action brought by eight purchasers of Flora Mir's securities for the usual alleged violations by way of misrepresentations of the Securities Act of 1933, 15 U.S.C. 77, *et seq.*, and Securities Exchange Act of 1934, 15 U.S.C. 78, *et seq.*, seeking compensatory and punitive damages of $800,000 plus interest (R. 1). Count 9 of the complaint also alleges a claim under Section 5 of the 1933 Act for an alleged failure to file a registration statement. Although the operative events took place in 1968, the action was not filed until 1972, no doubt prompted by the decline in Flora Mir's fortunes and the resultant filing in the United States District Court, S.D.N.Y., of a petition for an arrangement under Chapter XI of the Bankruptcy Act.

Defendants' answer denied the material allegations of the complaint and asserted numerous substantial affirmative defenses** (R. 3). These include and relate to the following matters, all substantiated or set forth in affidavits, other documents in the record and public documents:

> (a) The plaintiffs are sophisticated businessmen of substantial means, experienced in the affairs of Wall Street and were represented by legal counsel in connection with their purchase of the securities in

* Flora Mir is insolvent.

** Indeed, *subsequent* to their withdrawal from the action, defendants' counsel, which had deposed six of the eight plaintiffs, affirmed that there "are meritorious defenses to this suit" (143a).

issue (105a; see also fn., below). Indeed, each plaintiff acknowledged in the Purchase Agreement (191a), executed in connection therewith, under the heading *Disclosure of Information* that

> "* * * he, she or it was not induced to enter into this purchase agreement by any information, representation, or other statement not contained in this purchase agreement or in the debentures * * *" (193a).

and further, the defendants never at any time discussed the purchase of the securities with any of the plaintiffs and never met with any of the plaintiffs to discuss the securities in any respect (104a).

(b) Each of the plaintiffs acknowledged in the Purchase Agreement:

> "* * * that they understand that neither the debentures nor the shares of common stock issuable upon conversion of the debentures have been registered under the Securities Act of 1933, as amended" (197a).

(c) The claims asserted in this action were alleged affirmatively as defenses by the attorneys, who represented plaintiffs in their purchase of these securities, in an action brought against such attorneys by Mr. Koegel. (*Koegel* v. *Graff*, Sup. Ct. N.Y. Co., Index No. 8919/72). Koegel was granted summary judgment, Justice Korn holding that the provision in the Purchase Agreement set forth in (a), above, barred the defense of misrepresentation and presented "no triable issue" (Memorandum dated June 25, 1972).*

* Justice Korn was no doubt impressed by an affidavit made by those attorneys in connection with the Purchase Agreement in which they admitted that "all but three of [the purchasers] are professionals in the securities business"; that "the three other [purchasers] are sophisticated investors"; that "all of the purchasers are people "of considerable financial means"; and that the attorneys "advised each of the [purchasers] that they are to rely on investigations made by [them] and representations contained in the Purchase Agreement * * *" (Affidavit of Stuart W. Graff and Ronald Neumark, sworn to September 12, 1968).

(d) No registration statement was necessary since the sales of securities were not made pursuant to a public offering and were thus exempt from registration pursuant to Section 4(2) of the 1933 Act (104a).

(e) The action is barred in part by the applicable statutes of limitation and plaintiffs are guilty of laches in delaying for over three and a half years in bringing the action after they had knowledge as to the matters specifically alleged in the complaint (R. 3; 106a).

(f) As a matter of law, punitive damages are not recoverable in private actions based on the securities laws violations alleged in the complaint. *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (2nd Cir. 1969), *cert. den.* 397 U.S. 913 (1970); *Green* v. *Wolf*, 406 F.2d 291 (2nd Cir. 1968), *cert. den.* 395 U.S. 977 (1969).

The docket entries in the District Court reveal that the action was quite active, with much of the attention centering on plaintiffs' interrogatories and motion practice concerning alleged insufficient answers. However, it would serve no useful purpose to burden the Court with a detailed recitation of the give and take of this year-long "tug of war" (15a). Suffice it to say that it had reduced itself to the four interrogatories in question, which led to the following chronology of events in the District Court:

May 22, 1973

Special Master files Report and Recommendation on plaintiffs' motion to compel further answers to Interrogatories and recommends further answers to parts of four questions (174a).

June 7, 1973

Letter from defendants' counsel to plaintiffs' counsel, advising that they are "no longer counsel" for defendants (182a).

June 14, 1973

Defendants' attorneys move for an order permitting them to withdraw as counsel (144a).

June 14, 1973

Plaintiffs move for an order pursuant to Fed. R. Civ. Pro. 37, striking defendants' answer for "failure to respond to Interrogatories" (154a).

June 21, 1973

District Court confirms Special Master's Report of May 22 and orders answers to four interrogatories on condition that the answer be stricken (153a). Defendants do not receive notice of the existence or entry of this Order (97-98a).

July 25, 1973

Defendants' attorneys' motion to withdraw as counsel is granted. The Court indicates in its endorsement that it is prepared to act in two days on the motion to strike defendants' answer (21a).

August 2, 1973

The Court grants plaintiffs' motion and strikes defendants' answer (18a).

August 22, 1973

An order striking the answer and directing the entry of judgment for the amounts demanded in the complaint, plus interest, is entered (19a).

August 28, 1973

Defendants obtain new counsel (Weisman, Celler, Spett, Modlin & Wertheimer), which firm writes to defendants' former attorneys to request files and to ask them to furnish information concerning the Interrogatories, among other things, or limited access to the files. It appears that counsel asserted an attorney's lien on them, and the files were not available to defendants when the motion to strike was filed and determined (91a).

September 14, 1973

Defendants move to vacate the Order of August 22, 1973, pursuant to Fed. R. Civ. Pro. 60(b) (70a).

January 25, 1974

The Court files a Memorandum and Order denying the motion to vacate (14a).

January 28, 1974

Judgment in the sum of $919,147.50 is entered (10a).

The Court's Opinions and Findings

Although, as developed more fully below, the District Court totally misconstrued the legal standard for granting (and not relieving defendants from) the most drastic of all sanctions for alleged failure to comply with discovery obligations, it appears to have been equally misinformed as to the factual predicate therefor. Not only did the Court resolve factual disagreements against defendants on the basis of affidavits and conflicting sworn statements therein—while refusing defendants' requests for a hearing to test the conflicting statements in open court—but made findings in its opinions that were not even supported in the affidavits and other papers before it.

The bases for the Court's decision to strike defendants' answers are contained in its Endorsement of August 2, 1973 and in its Memorandum of January 25, 1974. From these decisions the Court made the following "findings" which, presumably, must form the factual predicate for the action it took.

The August 2 Endorsement

The Court set forth three distinct factors as the "basis" for its decision of August 2, namely:

(1) "the Order of the Court filed herein on June 21, 1973 (which ordered that unless defendants provide answers to certain interrogatories within 20 days of the time of the Court order, their answer be stricken)";*

(2) "the failure of the defendants to appear at scheduled depositions";

(3) "[the failure of defendants] to respond to the present motion * * *"

Recognizing that the defendants' failure to respond to the motion was due to its granting of defendants' counsel's motion to withdraw, the Court further found that "defendants were given adequate time to find new counsel and failed to do so."**

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* This order was entered *after* the motion to strike was made, and, accordingly, could not have been the basis for the *making* of the motion.

** The Endorsement also refers to the "material set forth" in plaintiffs' counsel's moving affidavit, which is nothing more than a self-serving diatribe against defendants. These matters are rebutted in detail in the affidavits of Lawrence Soicher, Esq. and David Koegel submitted in support of defendants' motion pursuant to Rule 60(b) (72a; 95a).

The Memorandum of January 25, 1974

Apart from repeating the items set forth in its Endorsement of August 2, the Court's Memorandum added the following items as bases for denying defendants' motion under Fed. R. Civ. Pro. 60(b):

(4) "* * * the Magistrate found that defendants had not adequately explained the absence of the pertinent books and records * * *";

(5) "The Magistrate found in his Report that Koegel was not cooperating with his counsel";

(6) "Koegel's claim * * * that he made diligent efforts to retain counsel in late July, 1973 fall short of demonstrating his good faith * * *"

The Court's Findings Analyzed

1. The Alleged Failure to Comply With the Order of June 21, 1973

The Order of June 21 confirmed the Magistrate's Report of May 22, 1973 and ordered that defendants serve further answers to four subparts of plaintiffs' interrogatories* (22a). As the chronology of events set forth above reveals, this order was entered *after* the motion to strike was made and *after* defendants' counsel had unilaterally announced its withdrawal, and had in fact moved to be relieved.

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* Items Nos. 20(a), (b), and (c), 38, 45(b) and 66(b). It is significant, as discussed below, in constitutional, as well as common sense, terms, that these items have little, if any, relevance to the merits of plaintiffs' claim and that substantially all of the information sought was of public record and/or in plaintiffs' possession. For example, the subordinated debenture referred to in No. 20, which contains the information sought by subparts (a) and (b), was physically on file in Flora Mir's Chapter XI proceeding, in which proceed-

Far from being a wilful failure, Mr. Koegel swears that he

> "was never served or made aware of [the order] until my new counsel brought it to my attention [after the order to strike was entered and that] at no time did [his] prior attorneys ever inform [him] of the existence of such an order * * *" (97-98a).

No mention was made of the June 21 order in a letter from the Court to Mr. Koegel, dated June 28, 1973 (85a).

In fact, it would have been impossible for Mr. Koegel to answer the interrogatories at that time in any event since, as can be seen from defendants' substitute counsel's letter to defendants' prior counsel, the file containing the necessary information was in the latter's possession and they refused to release it (91a). In this regard Mr. Koegel swears that:

> "* * * *all information necessary to answer these four Interrogatories completely had previously been turned*

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ing plaintiffs' attorneys represented these same plaintiffs, and the debenture in question is virtually identical to the debentures issued to plaintiffs pursuant to the Purchase Agreement. The answer to subpart (c) is specifically contained in Note 8 to Flora Mir's audited balance sheet dated May 31, 1968, which was part of the Annual Report sent to each of Flora Mir's security-holders and specifically delivered to plaintiffs pursuant to the Purchase Agreement (191a). The answer to No. 38, which is basically duplicative of No. 20, is similarly contained in the Annual Report dated May 31, 1968. As to Nos. 45(b) and 66(b), Flora Mir's assets are described in the May 31, 1968 balance sheet (which includes its subsidiaries) with a further breakdown provided in the schedules annexed to defendants' Supplemental and Amended Answers (R. 18). Additionally, plaintiffs and their attorney had available to them in the bankruptcy proceeding Main, LaFrentz & Co.'s individual balance sheets for Flora Mir and each of Flora Mir's subsidiaries as of May 11, 1969, which showed total assets for Borah Nut of approximately $25,000.

> *over to my former lawyers.** For example, with regard to Items 20(a), (b), and (c), and 38 * * *, I gave my prior attorneys a 100-page Bankruptcy Report which contained all of the details of the indebtedness of the defendant, Flora Mir Candy Corporation (hereinafter 'Flora Mir') to David I. Koegel Enterprises, Inc. (hereinafter 'Enterprises'). I also rutned [sic] over to my prior attorneys all books and records of Flora Mir which pertain to any transactions had with Enterprises. The aforementioned would have and should have enabled my prior counsel to respond fully to the aforesaid Items of Interrogatories long ago. My prior attorneys also have the original of the promissory notes and/or bonds which comprise the indebtedness of Flora Mir to Enterprises which likewise would have enabled them to provide full responses to the aforementioned four Items of Interrogatories long ago." (100-101a)

Although the moving affidavit on the motion to strike defendants' answer refers to defendants' "wilfulness" in connection with defendants' answers to interrogatories, the Magistrate made no such finding and implicitly found to the contrary.** It is difficult to comprehend how a party who has responded to forty-seven pages of interrogatories, containing endless subparts and subparts of the subparts on four separate occasions, can be said to be wilfully refusing to make discovery when it is found that parts of

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* Confirming the accuracy of these statements, when defendants' successor counsel on the Rule 60(b) motion finally obtained the file from prior counsel and had an opportunity to examine it, he swore that "the information requested by the interrogatories * * * are in the file and could have been responded to by [defendants' prior counsel] attorneys * * *" (R. 37).

** Magistrate Goettel wrote that "should depositions (or other discovery) establish that the defendants' failure to obtain the records and supply responsive answers to the interrogatories has been wilful, the conduct of defendants can be dealt with at that time." (175a)

four interrogatories having no direct relevance to the plaintiffs' claim have not been fully answered.

Thus, the record reveals that defendants were not served with the order requiring further answers to the four interrogatories; that defendants' counsel at the time the order was entered had withdrawn from the action and did not inform defendants of its existence; that the Magistrate's Report requiring the further answers did not find that the failure had been "wilful"; and that all defendants' books, records and other papers necessary to respond in connection with this matter were in defendants' former counsel's possession at all times.

2. *The Alleged Failure of the "Defendants" to Appear at Scheduled "Depositions"*

In its August 2 Endorsement, the Court refers to "defendants'" failure to appear at scheduled "depositions." However, the record reveals that only one deposition was involved, and in its Memorandum of January 25, the Court apparently recognized its overstatement and points to "the failure of *Koegel* to appear for a scheduled deposition of June 7, 1973." (Emphasis supplied.)

The deposition referred to was not that of defendant Koegel but of David I. Koegel Enterprises, Inc., which was first subpoenaed on July 31, 1972, as a third-party witness (167a). It appears that plaintiffs never bothered to take the examination at that time and did not seek to do so until almost a year later (103a).

Although the record is not clear as to what transpired thereafter between Mr. Koegel and his counsel with regard to the rescheduled June 7 deposition (compare 103a with

185a), counsel asserts that it informed Mr. Koegel that it was withdrawing as counsel but offered to attend the deposition nevertheless (185a). Counsel claims that their offer was refused.* Counsel thereupon wrote to plaintiffs' attorneys to inform them that they "have withdrawn as counsel" and to

> "respectfully request that the deposition of David I. Koegel Enterprises, Inc., as a witness, be adjourned until such date as new counsel is formally substituted" (183a).

In sum, there was no "failure" by defendant Koegel, wilful or otherwise, to appear at scheduled depositions but rather an adjournment requested in writing by his counsel because of its withdrawal from the action.

3 and 6. The Failure of Defendants to Respond to the Motion to Strike and the Alleged Lack of Good Faith in Retaining Substitute Counsel

The third basis enumerated by the Court for granting the motion to strike was defendants' failure to respond to the motion. However, this "failure" was of course due to counsel's simultaneous motion to withdraw, which was granted by the Court at the time the motion to strike was pending.

Recognizing this fact, the Court was obliged to deal with this question and did so with the convenient finding that the defendants' efforts "to retain counsel late in July 1973 falls short of demonstrating * * * [Koegel's] good faith" (16a).

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* If any such offer were made, and Mr. Koegel categorically denies it (104a), in the circumstance of the total breakdown of the attorney-client relationship, such refusal would certainly make sense.

Although the Court indicated in its letter to Mr. Koegel, dated June 28, 1973, that it intended to grant the motion to relieve counsel, it recognized that Mr. Koegel would be out of the country on business "between June 29 and July 17," and Mr. Koegel swears he did not receive the letter until he returned from South America on July 17, 1973 (96a). Thus, after being informed of the Court's decision, Mr. Koegel had approximately two weeks to obtain substitute counsel to oppose a motion that sought a $900,000 plus default judgment.

Mr. Koegel's affidavit shows that he did indeed make good faith efforts to obtain counsel in the very short time span afforded to him, and he swears that

> "from July 17, 1973 until the Court granted plaintiffs' motion to strike on August 2, 1973, I made several attempts to retain new counsel. Specifically, I attempted to retain Harold Schaefer, Esq. * * * and the firm of Roth, Carlson, Kwit, Spengler and Goodell* * * * There was a gap of at least several days between the time of initial contact of each of the aforesaid firms and the time they replied to me."** It was not until *after* the Court granted the plaintiffs' motion to strike that I was able to secure my present attorneys" (96a).

Defendants' former counsel confirms that he received "two or three telephone calls from attorneys * * * who had been approached to represent Mr. Koegel" (136a).

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* This was the name at that time of appellants' counsel's firm on this appeal. Although not part of the record, we will explain to the Court on oral argument, if it desires, the reasons underlying our inability to take on the matter, which we were most willing to do. We do affirm to the Court that Mr. Koegel was extremely serious in having us represent him and defend the motion and action.

** As the Court can see, the file in this matter is fairly extensive, and several days would be needed by any attorney to decide on retainment.

The record also reveals a specific written request addressed to the Court for "a further extension of time * * * to retain new counsel" (110a) and numerous oral requests to the Court to the same effect (74a). The Court did not mention nor respond to these requests.

Thus, the record shows that defendants' "failure to respond" to the motion to strike was because its then counsel was seeking to withdraw; that, as a practical matter, Mr. Koegel had two weeks to obtain substitute counsel; that he made substantial efforts in that regard in the time frame imposed upon him; that it was requested of the Court in writing that a longer period to obtain substitute counsel be afforded; and that he finally succeeded in obtaining counsel shortly after defendants' answers were stricken.

4. The Reference to the Magistrate's Finding That Defendants Had Not Adequately Explained the Absence of Pertinent Books and Records

In its January 25 Memorandum, the District Court wrote that

> "* * * the Magistrate found that the defendants had not adequately explained the absence of pertinent books and records, *nor had they raised cogent objection to their production*" (15a, 16a, emphasis added).

However, the Magistrate's Report (174a) will be read in vain for any reference to the failure to "produce" documents, since there was no obligation on defendants to produce any books and records, and no notice for the production of documents was before the Magistrate. Rather, as can be seen from the Report, counsel had explained that

their inability to answer fully a few of the interrogatories was caused by the lack of certain books and records, which were used and were before the Court in the Chapter XI proceedings for defendant Flora Mir. Indeed, as noted above, the Magistrate was aware that the absence of this material may have been beyond the fault of defendants, in writing that:

> "* * * should depositions (or other discovery) establish that the defendants' failure to obtain the records and supply responsive answers to the interrogatories has been wilful, the conduct of defendants can be dealt with at that time."

Thus, there was no failure to produce pertinent books and records, to say nothing of a wilful failure, but rather an assertion by defendants' counsel that they were unable to locate records which were needed to answer fully a few interrogatories. As the Magistrate pointed out in his Report, these records were part of the public record in the Chapter XI proceedings involving defendant Flora Mir.

It cannot be overlooked that defendants were not present at the hearing before the Magistrate and that it was counsel—and not Mr. Koegel—that asserted the records were not available and were needed to answer the interrogatories in question. Mr. Koegel swears that he made

> "every good faith effort to provide [his] prior attorneys with all information necessary for them to prepare full and complete answers to the interrogatories * * * [including information and documents from] the accountants for Flora Mir, Main Lafrentz & Co. * * * [and that they] had access to all his business files" (98a).

Mr. Koegel also specifically swears that he

> "* * * turned over to [his] prior attorneys all books and records of Flora Mir which * * * would have and should have enabled [them] to respond fully to the [four interrogatories in dispute]" (101a) [and] "after furnishing [his] previous attorneys with all of the information they requested, [he] relied entirely on their judgment in responding to the Interrogatories and to handle all legalities with reference to same" (100a).

5. *The Reference to the Magistrate's Finding That Mr. Koegel Was Not Cooperating With His Counsel*

As can be seen from the affidavits submitted in support of the motion to vacate under Rule 60(b) and defendants' prior counsels' affidavits, the attorney-client relationship seriously deteriorated in 1973. Mr. Koegel swears that counsel had not done their job in responding to discovery demands; counsel asserts that Mr. Koegel had not provided them with all the necessary information and help and that, as a result of the plaintiffs' extraordinary discovery demands, fees over and above the initial request were demanded and not paid (102a).*

Apparently, the Magistrate accepted counsel's version, as did the Court in relieving them as counsel. However, the Magistrate's finding was made *without Mr. Koegel's presence* either to respond to counsel's charges or to explain his version of the problems with counsel. At the least, elementary fairness would dictate hearing from Mr.

* The Court was informed by letter under date of July 18, 1973 that "Mr. Koegel had agreed on a monthly retainer with [prior counsel] for representation in this matter and for which he had abided by throughout this litigation" (89a).

Koegel before the Magistrate made such a finding and before the Court confirmed it as a basis for entering a default judgment.

The Requests for a Hearing

As noted above, defendants made at least two requests for a hearing, where the sharp issues of fact presented by the affidavits could be tested in open court. On July 18, 1973, a letter was sent to the Court in which it was "respectfully requested that His Honor set a hearing for this motion so that Mr. Koegel may testify and prove by documentary evidence [his version of the facts]" (89a). Furthermore, in his affidavit in support of the motion to vacate, Mr. Koegel again requested a hearing and swore as follows:

> "5. If there is any doubt about the circumstances surrounding the alleged deficiencies in the Answers to the aforesaid four Items of Answers to Interrogatories, I respectfully request a hearing to prove that any such deficiency was not caused through any fault of mine. At such a hearing I would be prepared to prove that (a) I never suppressed or failed to produce any information in my dominion, control or possession which was called for by the Interrogatories, and (b) I was never served or made aware of the June 21, 1973 Court Order directing that Answers be furnished to four specific Items of Interrogatories.
>
> "6. With respect to the oral deposition of which Enterprises was subpoenaed to appear as a witness, after being served with a subpoena I was prepared to attend such deposition on behalf of Enterprises on the date originally scheduled in the subpoena, but was

told by my prior attorneys that it was being adjourned because my wife, Lorna Koegel, was going to be examined first and they would let me know when I was needed in the future. I was never notified to appear on any subsequent date.

"I state unequivocally that I never requested my previous attorneys to seek any adjournment or postponement of the deposition of Enterprieses [sic] as scheduled in the subpoena issued to me, nor did I ever refuse to appear for said deposition. In any event, I stand ready now, as I have always been, to submit to such an examination." (102-104a)

POINT I

Defendants have been deprived of their property without due process of law since (a) the "sanction" imposed bore no reasonable relationship to defendants' alleged failure to comply with discovery obligations and was punitive in nature and (b) there was no knowing disobedience of any outstanding court order.

As early as 1896, the Supreme Court in *Hovey* v. *Elliott*, 167 U.S. 409, reversed the striking of the answer and entry of a default judgment against a defendant who refused to produce documents required by a court order. The Court held that the sanction imposed was "a punishment" and went beyond that which was necessary to secure compliance with the defendant's obligations.

In *Societe Internationale, etc.* v. *Rogers*, 357 U.S. 197 (1958), the Supreme Court reaffirmed the teaching of *Hovey*, writing that

"The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth

> Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.) p. 4325, 28 U.S.C.A." (at p. 209)

While the exact parameters of these "constitutional limitations" have not, as yet, been clearly delineated, Judge Waterman, in speaking of a plaintiff's claim,* has put the issue in these terms:

> "If the cause has not gone to trial and it is before a Court of Appeals following an order of dismissal or a contempt conviction, the reviewing court, before affirming the use of these drastic sanctions permissible under Rule 37, will scrutinize the situation out of which the sanction order arose. The contempt sanction, though wicked-sounding, is not nearly as drastic a sanction as dismissal. It only leads to a fine or a possible jail sentence—its use does not result in the termination of a litigant's cause of action."**

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* The Supreme Court underscored in its decision in *Rogers* that a defendant's rights in the instant circumstance must be guarded even more jealously than a plaintiff's who invoked the jurisdiction of the Court. (357 U.S. at 210)

** Waterman, "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders," 29 F.R.D. 520 at 423 (for convenience, *Waterman*).

Both the Fifth and Tenth Circuits have taken express cognizance of the principles enunciated in *Hovey* and *Rogers* and reversed, respectively, the striking of a complaint, and answer, for failure to comply with discovery obligations. In *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970), relying on *Rogers*, the Court reversed the dismissal of a complaint for failure to produce certain documents pursuant to a Rule 37 order, writing that Rule 37:

> "* * * is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions. The court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior." (at 860-861)

In *Robison* v. *Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966), the Court reversed the entry of a default judgment for failure to respond to interrogatories, holding that "the office of [Rule] 37(d) is to secure compliance with the discovery rules, not to punish erring parties" (at 39).

Applying these basic principles to the facts at issue, it is clear that an "alternative, less drastic sanction" could have achieved compliance (assuming there was non-compliance) with defendants' discovery obligations. See *Waterman*, cited above, at p. 425. The entry of a default judgment in excess of $900,000 bears absolutely no relationship, reasonable or otherwise, to the enforcement of plaintiffs' discovery rights.

There was, after all, no destruction or wilful withholding of evidence which could be said to have foreclosed

plaintiffs' ultimate presentation of their claim, nor was there similar conduct that could be used as "an admission of want of merit to the asserted defenses." *Hammond Packing Co.* v. *State of Arkansas*, 212 U.S. 322, 351 (1908).* In fact, when stripped to essentials, the District Court was dealing, at the worst, with the failure to respond to four interrogatories and the failure of David Koegel Enterprises, Inc. to appear as a third-party witness at its deposition.

As to the former, the interrogatories sought information that was barely relevant to plaintiffs' claim and the District Court did not find, nor even advert to, its materiality in the action. See, e.g., *Von Der Heydt* v. *Rogers*, 251 F.2d 17 (D.C. Cir. 1958, reversing the District Court's dismissal of a complaint for failure to produce documents, since it had made no findings "on the issues of materiality of records sought * * *"); *Dorsey* v. *Academy Moving &*

* The Supreme Court explained in *Rogers* that the entry of the default judgment in *Hammond* rested on the "permissible presumption" that a refusal to produce material evidence is an admission of the truth of the opposing party's claim and that therefore the striking of the defendants' answer in *Hammond* could be said to be other than punitive in nature. However, it questioned the circumstances in, and the extent to which, the presumption utilized in *Hammond* could be relied upon in light of the constitutional requirement with respect to presumptions that the "fact proved" (here, alleged failure to supply evidence) must bear a "rational relation" to the "ultimate fact presumed" (here, the truth of the plaintiff's claim). Cf. *Tot* v. *United States*, 319 U.S. 463 (1943). In the instant case, it is manifest that the failure to answer four mostly irrelevant interrogatories and the failure of a third-party witness to attend a deposition can bear no rational relation "in common experience" to the truth of the plaintiff's claim or the lack of merit of defendants' defenses, even assuming the validity of the *Hammond* presumption. In sum, to presume that defendants' alleged failures in question are admissions of plaintiffs' entire case is "violent, and inconsistent with any argument drawn from experience" (*Tot*, at 468) and goes far beyond the constitutional limitations prescribed by the Fifth Amendment.

Storage, Inc., cited above, reversing for the failure to make specific findings as to the "plaintiff's ability to furnish the information" and that the failure to do so was "wilful" and "in bad faith" (423 F.2d at 860).

As to the deposition of David Koegel Enterprises, Inc., constitutional limitations aside, there is nothing in the Federal Rules which permits a court to enter a default judgment because a third-party witness has not appeared —even one which is related to a defendant. Again, there was absolutely no showing of the materiality or relevance of the information that would be sought from this entity and, certainly, a sanction less drastic than the one imposed could have been fashioned that would have "secured compliance." Indeed, as developed at pp. 16, 20-21 above, Mr. Koegel swears that he was ready at all times to attend his deposition, and did not do so because of counsel's withdrawal from representation on the day it was to be held (182a).

Although not clearly delineated, a further constitutional limitation implicit in *Rogers* is that there be a wilful violation of an "order", before a defendant is to be deprived of a trial on the merits. See *Dorsey* v. *Academy Moving & Storage, Inc.*, cited above. At least one court has expressly held that the dismissal of an action under Rule 37 may "be resorted to only after disobedience of an order compelling an answer * * *." *Maurer-Neuer Inc.* v. *United Packinghouse Wkrs. of A.*, 26 F.R.D. 139 (D. Kansas 1960). Until an order is in fact entered, it can hardly be said that a court has "attempted to secure compliance with the discovery rules" before resorting to the constitutionally

questionable sanction of depriving a defendant of a hearing on the merits. See, e.g., *Robison,* cited above.

As shown at p. 9 above, the only discovery order outstanding against defendants was the order of June 21 relating to the four interrogatories. However, it is undisputed in the record that defendants received no notice, actual or otherwise, thereof, and it was not, and could not have been, found by the District Court, as *Rogers* requires, that the defendants willfully failed to comply. *Dorsey* v. *Academy Moving & Storage, Inc.*, cited above. Indeed, this Court has reversed an order of dismissal where it appeared that the plaintiff had not actually received certain notices which led to the order. See *Vindigni* v. *Meyer,* 441 F.2d 376 (2nd Cir. 1971).

In sum, however narrowly the Court may interpret the "constitutional limitations," these limitations certainly preclude the entry by default of a judgment of this magnitude for the mere failure to answer four immaterial interrogatories required by an order, of which defendants admittedly had no actual knowledge, and for the failure of a third-party witness to attend a deposition at which it was always willing to appear.

POINT II

The District Court erred by applying a "good-faith" standard in ordering the imposition of the most drastic sanction available under Fed. R. Civ. Pro. 37. At the barest minimum, to impose such a sanction Rule 37 constitutionally and otherwise requires a finding of "wilfulness," which finding the District Court did not and could not make.

Plaintiffs' motion of June 14, 1973 purported to seek relief on subsections (b) and (d) of Fed. R. Civ. Pro. 37. The District Court's Endorsement of August 2, 1973, however, did not indicate on which of these two subsections it was relying in imposing the sanction. Indeed, even in its January 25, 1974 Memorandum denying defendants' Rule 60(b) motion, the District Court failed to elucidate the statutory basis for the sanction imposed. Thus, it is necessary to examine both subsections of Rule 37 in light of the facts known to the Court at the time it denied the Rule 60(b) motion.*

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* The District Court's January 25, 1974 decision on the Rule 60(b) motion was in fact (or should have been) a reconsideration of the predicate, both legal and factual, of its August 2, 1973 decision. This Court, therefore, in reviewing the propriety of the Rule 60(b) order, must examine the underlying Rule 37 order from which the Rule 60(b) motion sought to be relieved and must decide if, based on the facts which came to light after its August 2, 1973 decision, defendants should have been relieved from the Rule 37 sanction imposed. In fact, in this exact situation, the Seventh Circuit recognized that an appellate court's power extends to the vacation of a default judgment entered pursuant to Rule 37(d) on appeal from the denial of defendants' motion to vacate under Rule 60(b). *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973).

(a) Fed. R. Civ. Pro. 37(b)

Subsection (b) of Rule 37 provides for the imposition of a variety of sanctions for the failure to comply with a court *order* relating to discovery.* At the time plaintiffs moved for the imposition of discovery sanctions, however, there was no order of any kind outstanding. Nevertheless, the subsequent order of June 21, 1973, confirming the Special Master's Report and ordering the defendants to answer the four interrogatories was one of the stated reasons for the Court's decision (18a).

However, Koegel's affidavit makes clear and the record is uncontradicted, that he had no *notice* of the existence of this order until after the August 2, 1973 decision. Thus, the Court could not have based its January 25, 1973 decision on the failure to comply with this order, since the imposition of such a sanction when the party had no *actual* knowledge of the order would clearly have been error. See, e.g., *O'Toole* v. *William J. Meyer Co.*, 243 F.2d 765 (5th Cir. 1957); *Patterson* v. *C.I.T. Corporation*, 352 F.2d 333 (10th Cir. 1965). In fact, this Court has reversed an order of dismissal where it appeared that the plaintiff had not *actually* received certain notices which led to the order. *Vindigni* v. *Meyer*, 441 F.2d 376 (2nd Cir. 1971).

As noted in Point I above, the Fifth Circuit in *Dorsey* v. *Academy Moving & Storage, Inc.*, cited above, reversed an order striking a complaint for failure to comply with an

* Since the most drastic "discovery" sanctions must, for constitutional reasons, be limited to wilful violations of discovery orders under Rule 37(b), we submit it is critical in the first instance to determine whether the Court's decision was based on Rule 37(b) or (d).

outstanding discovery order for production of documents, since there was no hearing on the question of whether, and no finding that, the failure was "wilful" and "in bad faith." It further explained that

> "The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of a production order when the failure 'was due to inability fostered neither by its own conduct nor by circumstances within its control'. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 1958, 357 U.S. 197, 211, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255, 1266." (423 F.2d at 860).

To the same effect, see *Hinson* v. *Michigan Mutual Fidelity Co.*, 275 F.2d 537 (5th Cir. 1960).

Thus, since the record is undisputed that Koegel had no knowledge of the only outstanding discovery order, there could have been no finding that his failure to comply was "wilful" or "in bad faith" and, accordingly, the District Court must have relied on Rule 37(d) as authority for the result it reached.

(b) Fed. R. Civ. Pro. 37(d) and the Requirement of "Wilfulness" for the Imposition of Substantial Sanctions

As indicated in Point I above, the severity and penal nature of the Rule 37(b)(2)(C) sanctions of dismissal and default judgment require that their use be limited to situations where, among other prerequisites, a Rule 37(b) *order*

has been wilfully disobeyed. However, assuming that an intentional violation of a prior "order" is not a prerequisite to such sanction, and that such sanction may be imposed under Rule 37(d), the question becomes one of what conduct under that subdivision may properly justify the imposition of the sanction of striking an answer and entering a default judgment.

Before the 1970 Amendments to Rule 37, by the terms of Rule 37(d) itself, only "wilful" failures to comply with discovery obligations would subject a party to any of the Rule 37(d) sanctions. Similarly, the severity of the Rule 37(b)(2)(C) sanctions of dismissal and default judgment and undoubtedly the constitutional limitations expressed by the Supreme Court in *Rogers* led to the requirement that before these sanctions could be imposed, even under subdivision (b) of Rule 37, the party's failure to comply with discovery obligations had to be "wilful." *Hinson* v. *Michigan Mutual Fidelity Co.*, 275 F.2d 537 (5th Cir. 1960); 4A Moore, *Federal Practice*, ¶37.05, p. 37-91 (1974). Thus, before the 1970 Amendments, the sanction of striking a pleading was clearly limited by the mandates of *Rogers* and of the Federal Rules themselves to, among other factors, only "wilful" failures.

This limitation to "wilful" failures was not in any way altered by the 1970 Amendments to Rule 37(d) as to severe sanctions, despite the deletion of the word "wilful" from Rule 37(d). The Advisory Committee Note of 1970 to Amended Rule 37 makes explicit the reasons for the deletion of the word "wilful" from Rule 37(d), and its continued importance for the imposition of substantial sanctions:

> "Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders 'as are just'; and the requirement that the failure to appear or respond be 'wilful' is eliminated. Although Rule 37(d) in terms provides for only three (3) sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those it set forth. [Cases cited therein.] The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.
>
> "The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be 'wilful' * * * 'Wilfulness' continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208 (1958)."

Thus, the limitation of the most severe "discovery" sanctions to "wilful" failures continued after the 1970 Amendments. See, e.g., 4A Moore, *Federal Practice*, ¶37.05, p. 37-95, n. 14 (1974).

We believe we have shown in the statement of facts above that, far from exhibiting the requisite "wilful disobedience, gross indifference" to the two specific discovery obligations in dispute, defendants' conduct was totally unintentional and traceable solely to the dispute that arose with their counsel. However, this determination need not be made, since it is plain from the face of the Court's Memorandum that it incorrectly applied a "good-faith" standard rather than the one mandated by the Federal Rules for the imposition of substantial sanctions.

(c) The Failure to Make Findings

Consistent with its failure to indicate the subdivision of Rule 37 relied on for the imposition of this discovery sanction and its failure to apply the correct standard under that Rule, the District Court also failed to make the requisite findings which must precede the imposition of substantial sanctions under Rule 37. This failure itself constitutes reversible error.

First, the District Court:

> "made no finding that the plaintiff's failure to produce the requested documents was either wilful or in bad faith, [or that] the plaintiff had not made a diligent effort to obtain the documents." *Dorsey* v. *Academy Moving & Storage, Inc.*, at 861.

Nor did it find, as required by *Dorsey* (at 860) and *Anderson* v. *Nosser*, 438 F.2d 183, 204 (5th Cir. 1971), *cert. den. sub nom. Nosser* v. *Bradley*, 409 U.S. 848 (1972), that defendants' alleged failure to comply with their discovery obligations was:

> "predicated upon the presence of such factors as wilful disobedience, gross indifference to the right of the adverse party, deliberate callousness or gross negligence."

Finally, the District Court made no finding that the information sought to be discovered was in any way material or relevant to the plaintiff's case as required by *Von Der Heydt* v. *Rogers*, cited above.*

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* As noted in Point I above, the constitutional considerations noted in *Hovey* and *Rogers* require that some showing be made that the information wilfully withheld bear "a reasonable relation" to plaintiff's claim before a party's pleading may be stricken under Rule 37.

In sum, the Court's failure to make the requisite findings concerning wilfulness and materiality in itself constitutes reversible error.

POINT III

The District Court abused its discretion and applied the wrong standard in denying defendants' motion under Fed. R. Civ. Pro. 60(b), since defendants more than made a *prima facie* showing on the issues of mistake, inadvertence and excusable neglect. Upon such a showing, this Court has required that Rule 60(b) be liberally construed to permit a party to defend on the merits, especially where, as here, meritorious defenses have been alleged and a large default judgment is at stake.

Fed. R. Civ. Pro. 60(b) provides in relevant part that

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * *."

The Federal courts, including this Court, have consistently mandated a liberal construction of Rule 60(b) in an effort not to deprive a litigant of a trial on the merits. This policy has been carried out even in circumstances where the conduct sought to be excused was "an affront to the Court" and could not be "condoned," or was found to be "improper" or involved some form of "neglect." See, e.g., *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973); *Peterson* v. *Term Taxi Inc.*, 429 F.2d

888 (2nd Cir. 1970); *Radack* v. *Norwegian America Line Agency, Inc.*, 318 F.2d 538 (2nd Cir. 1963). Whether the question is to vacate an order striking an answer under Rule 37 for failure to comply with discovery obligations as in *Vac-Air*, cited above, or other orders entered for non-compliance with the party's obligations under the Federal Rules, Rule 60(b) is

> "* * * to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments [cite omitted]. Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits * * *." *Tolson* v. *Hodge*, 411 F.2d 123, at 130 (4th Cir. 1969).

In exercising its powers under Rule 60(b), the Courts have stressed four key factors, namely:

1. Does the party have a substantial claim or defense;
2. Will real prejudice result in the other party from vacating the order in question;
3. Will a judgment for a large sum of money be made without a hearing on the merits; and
4. Resolving the issues of fact favorable to the party seeking to be relieved, is there a showing of mistake, inadvertence or excusable neglect.

In addition to the cases cited above, see *Erick Rios Bridoux* v. *Eastern Air Lines, Inc.*, 214 F.2d 207 (D.C. Cir. 1954); *In re Kosmadakes*, 444 F.2d 999 (D.C. Cir. 1971); *Daly* v. *Stratton*, 304 F.2d 666 (7th Cir.), *cert. den.*, 371 U.S. 934 (1962).

A reading of the District Court's Memorandum and Order denying defendants' motion reveals that no cognizance was taken of the policy underlying, or standards to be applied on, such a motion. Concluding that defendants had failed to convince it of their "good faith," it appears that little, if any, weight was given to the moving affidavits, notwithstanding the requirement that "any doubts about whether relief should be granted should be resolved" in favor of movant. *Tolson* v. *Hodge*, cited above, at 130. In fact, failure to take cognizance of the moving affidavits has been held to be reversible error under Rule 60(b). See *Welden* v. *Grace Lines, Inc.*, 404 F.2d 76 (2nd Cir. 1968). As noted above, this Court has reversed for failure to provide relief under Rule 60(b) even where plaintiff exhibited "failure of good judgment and [the] conduct was an affront to the court." *Peterson* v. *Term Taxi, Inc.*, cited above, 429 F.2d at 891.

We have shown in the statement of facts above that defendants more than satisfied each of the factors which the courts look to in determining whether to vacate an order disposing of a case without a trial on the merits. We have shown that (1) defendants set forth highly meritorious defenses and, indeed, may be entitled to judgment as a matter of law (at pp. 6-8 above); (2) that the judgment involved will deprive the individual defendant and his family of the fruits of a life's work and is a substantial judgment viewed by any standard; (3) that plaintiffs would not have been prejudiced by granting of the motion and at most would have suffered a few months' delay in proceeding with discovery in the action; and (4) that defendants' affidavits made at the least a *prima facie*

showing of mistake, inadvertence, or excusable neglect as to the matters delineated in the August 2 endorsement. (See pp. 11-20 above.)

While we submit that the District Court's action was a clear abuse of discretion, when dealing with matters of this magnitude, an appellate court is not limited by such a standard. In fact, the D.C. Circuit has affirmed the principle that

> "* * * 'Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order.' Madson v. Petrie Tractor & Equipment Co., 196 Mont. 382, 77 P.2d 1038, 1040." *Erick,* cited above, at 210.

POINT IV

At the least, the District Court was required to hold an evidentiary hearing to determine the truth of the matters and the issues of fact presented in defendants' moving affidavits on its motion to vacate under Rule 60(b), since these affidavits raised substantial questions concerning their good faith and lack of wilfulness in connection with their discovery obligations.

As discussed in Point I above, the Supreme Court has cautioned as to the "constitutional limitations upon the power of courts * * * to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale, etc.* v. *Rogers,* 357 U.S. 197, 209 (1958). While, as noted, the parameters of this limitation are not precisely clear from *Rogers* and its forebears, at the very least, the Supreme Court has held

that substantial constitutional questions are "provoked" when a pleading is stricken under Rule 37 in the circumstance where a party did not intentionally fail to comply with outstanding discovery orders.

Unquestionably, the moving affidavits on the motion under Rule 60(b) showed that there had been no failure to act in good faith in connection with the only outstanding order for discovery, i.e., the June 21 order relating to the interrogatories, since, among other things, it was undisputed that defendants were never made aware of the existence of that order. See, *Vindigni* v. *Meyer*, 441 F.2d 376 (2nd Cir. 1971, reversing for further proceedings an order denying a motion under Rule 60(b) to vacate an order of dismissal where it appeared that plaintiff's attorney had disappeared and plaintiff had not actually received certain notices).

The moving affidavits further made a *prima facie* showing as to defendants' good-faith attempt to discharge their obligations in connection with the other matters set forth in the Court's opinion. See pp. 17-22 above. If such sworn statements are true, as we must assume they are, the District Court's action plainly violated defendants' constitutional rights under *Rogers*. See *Dorsey* v. *Academy Moving & Storage, Inc.*, cited above.

At the least, the District Court was presented with affidavits which raised contested issues of fact as to the circumstances surrounding defendants' conduct and what knowledge they in fact had. As noted in Points I and II, the Fifth Circuit has reversed the striking of a complaint

for failure to comply with an outstanding discovery order, since the District Court

> "* * * held no hearing on the plaintiff's ability to furnish the information and made no finding that the failure * * * was wilful, in bad faith or that the plaintiff had not made a diligent effort to obtain such information." (*Dorsey,* cited above, at 860).*

This Court has also in similar circumstances reversed and required a "full evidentiary hearing." See *Vindigni* v. *Meyer,* cited above. Indeed, on motions that have far less weighty consequences to a party's rights than those involved here, this Court ha.. held that a testimonial hearing must be had:

> "Generally, of course, a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' *Sims* v. *Greene,* 161 F. 2d 87, 88 (3rd Cir. 1947)." *Dopp* v. *Franklin National Bank,* 461 F.2d 873, 879 (2nd Cir. 1972).

In *Sims,* the Court, reversing the grant of a preliminary injunction, wrote as follows:

> "Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. *Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an*

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* Can it be said that the most elementary principle of fairness underlying our jurisprudence was satisfied when, for one example, the Court affirmed the Magistrate's finding that Mr. Koegel was "not cooperating with his counsel," when that finding was made, *ex parte,* in the absence of Mr. Koegel? If the Court felt this issue so relevant, did not Mr. Koegel deserve his day in court to explain his position that counsel was not doing its job, and seeking to obtain fees greater than initially agreed to—with a searching cross-examination of both to find where the truth really lay?

> *issue of fact necessitates opportunity to present evidence and not by only one side to the controversy* * * *'' (161 F.2d at 88) (Emphasis supplied)

This general rule concerning evidentiary hearings has been squarely applied in the context of a Rule 60(b) motion. In *Federal Deposit Ins. Corp.* v. *Alker*, 234 F.2d 113 (3d Cir. 1956), the Court wrote:

> "Obviously such a determination [as to whether relief under 60(b) should be granted] could only be made after a full hearing in the district court at which the defendants have an opportunity to produce their witnesses and the use—plaintiffs their rebutting witnesses." (*Id.* at 117)

See also, *Vindigni* v. *Meyer*, cited above.

In sum, if the facts stated in defendants' moving affidavits in support of their motion for an order under Rule 60(b) are true, the District Court's action was constitutionally and otherwise impermissible. To make a contrary determination, due process and elementary fairness required a testimonial hearing.

Conclusion

The judgment should be vacated and the order denying defendants' motion under Fed. R. Civ. Pro. 60(b) should be reversed.

Respectfully submitted,

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